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IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM A. WRIGHT,
Comptroller General,

vs.

LOUISVILLE & NASHVILLE R. R. CO., ET. AL.

N[redacted]

SUPPLEMENTAL BRIEF

of

BOYKIN WRIGHT and JOHN C. HART, FOR PETITIONER.

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WILLIAM A. WRIGHT, Comptroller General,

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LOUISVILLE & NASHVILLE R. R. CO., ET. AL.

No. 234. October Term, 1903.

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BOYKIN WRIGHT and JOHN C. HART, FOR PETITIONER.

I.

For a statement of the case and a full brief of the argument for the State of Georgia, reference is made to the Printed Brief submitted to this Court on the Application for the Writ of Certiorari in this cause, copies of which have been filed herein as the brief and argument for the State in this hearing.

II.

Two questions are presented by the Record:

(1). Did the complainants have such interest in the matter complained of as to entitle them to maintain said Bill, and such equity as to entitle them to relief by injunction?

(2). Are the shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Rail-

road & Banking Company, a Georgia corporation, taxable as property of the latter, by the State of Georgia?

The first question is treated of fully in the Printed Brief referred to, pages 6 to 11, inclusive, and requires no further elaboration herein.

The second question has also been fully discussed in the Printed Brief, pages 11 to 27, inclusive. But the following supplemental observations on this branch of the case are respectfully submitted.

III.

TAXATION OF SHARES OF STOCK IN A FOREIGN CORPORATION IN THE STATE OF THE OWNER'S RESIDENCE.

This Court has in a very recent case (Kidd vs. Ala., 188 U. S., 730) carefully considered this question and ruled substantially the following points:

(1). Mrs. Kidd, a resident of Alabama, must there pay taxes on her stock in a railroad company located in a foreign State;

(2). The "equal protection" clause of the U. S. Constitution was not violated in taxing such stock while exempting stock in domestic railroads, whose *property and franchises* were taxed in Alabama;

(3) This decision assumed that the Code of Alabama, as interpreted by the Supreme Court of Alabama, *did tax* these shares of *foreign* railroads and *did exempt* shares in domestic railroads;

(4). The Supreme Court of Alabama in this case (28 So. R., 480) ruled that there was no specific act in so many words taxing shares in foreign railroads, the law merely "declaring subject to taxation 'all other property real and personal not otherwise specified'" (28 So. R., 481), and holding that shares in stock of corporations are "personal property," 28 So. R., 481. and on *general principles that* its situs for taxation is at the owner's domicile.

28 So. R., 481.

(5). That if the corporate property is untaxed by its laws (those of Alabama) then for the purposes of its laws the property is not taxed at all. If the property is taxed elsewhere, with this the State of Alabama is not concerned;

(6). The *right* to tax stock in foreign corporations is assumed.

IV.

THE SITUS OF SHARES OF STOCK.

Counsel for the Railroad Companies cite two rather recent cases in support of their contention that the situs of shares of stock is at the *domicile of the corporation*, and not at the residence of the stockholder, viz., People's National Bank, etc., vs. Cleveland, 117 Ga., 908, and The Jellenik vs. Huron Copper Mining Company case, 177 U. S., 1.

Neither of the above cases related to the situs of shares for purposes of taxation.

In People's National Bank, etc., vs. Cleveland, above cited, the Supreme Court of Georgia merely decide that shares of stock in the Georgia Railroad & Banking Company, held in Tennessee by an owner there, is personal property located in Richmond county, Georgia, (the locus of the corporation) *for the purpose of that suit*. The plaintiffs in that suit claimed that they were the real owners of the stock in the Georgia Railroad & Banking Company, the script having been fraudulently acquired by the Tennessee holder, and brought their equitable petition in Richmond county Georgia, against the Georgia Railroad & Banking Company, and the Tennessee holder of the shares and prayed for a decree cancelling the fraudulent script, and for the payment of the dividends to plaintiffs.

Manifestly "*for these purposes*" the situs of this suit was in Georgia, at the domicile of the corporation. The Court held:

(2). "The shares of stock were personal property and for the purposes of *this suit their situs* was the domicile of the domestic corporation."

117 Ga., 908.

Well, what was the "purpose of that suit?"

It was to compel the corporation to recognize the plaintiffs as the true owners of the stock, and not the persons to whom it had issued the shares, through the fraud of those parties, and to cancel the old stock and issue new stock to plaintiffs. That could only be done here in Richmond county where the corporation was domiciled; and under a special statute of Georgia providing for service by publication in such cases the holder of the shares in Tennessee could be served and bound. There is nothing in that decision in conflict with the general doctrine that shares of stock are personal property and for purposes of taxation their situs is at the domicile of the owner.

The Jellenik case in 177 U. S., 1, cited, likewise is not in conflict with this doctrine. In this case precisely that was done which was done in the Georgia case (117 Ga., 908), viz., the jurisdiction of the Court was sustained on the idea that under the Michigan statute the shares were personal property located at the domicile of the corporation "for the purposes of that suit" within the meaning of the Act of Congress of 1875, giving United States Courts jurisdiction over non-resident defendants in cases where they are interested in property within the District, which was to compel the corporation to "cancel the certificates held by persons outside of the State and regard the plaintiffs as the real owners of the property interest represented by them (shares)," and to remove cloud from title.

177 U. S., at 14.

In this case the Supreme Court of U. S. says (p. 13):

"Whether stock is in Michigan so as to authorize that State to subject it to taxation as against individual shareholders domiciled in another State is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it (the stock) is within Michigan *for the purposes of a suit brought there against the Company*—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them."

177 U. S., 13.

No doubt was expressed that these shares held in Massa-

chusetts were *taxable there* in the hands of the resident owners. And that is the only point involved in the case at bar.

Again, in the Jellenik case, above, suit was brought in the United States Court for the Western District of Michigan by plaintiffs against the Huron Copper Mining Company, a corporation, and others, of Michigan, and citizens of other States than Michigan; among them Watson, Demmon and Stevens, being residents of Boston, Mass.

Process was served upon the Huron Mining Company and other defendants residing in Michigan: Watson, Demmon and Smith being non-residents, were proceeded against by publication, but they failed to appear. The company appeared and pleaded to the jurisdiction of the Court, because:

(1). That Watson, Demmon and Smith were indispensable parties to the suit but not inhabitants of the District, and there was no service in the District, nor had they voluntarily appeared and submitted themselves to the jurisdictioon of the Court;

(2). That the stock of the Huron Company belonging to the complainants was not personal property "within the District."

The plea was sustained and the case appealed to the Supreme Court. Of course Watson, Demmon and Smith being indispensable parties and *non-residents* the Court had no jurisdiction of their persons (they not being actually served in the District. Service in this suit was made*by publication,* based on the Act of Congress of 1875, which declares:

"When in any suit commenced in any Circuit Court of the United States, to enforce any legal or equitbale lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property *within the District* where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within said district, or shall not voluntarily appear thereto" service may be made on such absent defendants by publication. Provisions is made in said Act also for service upon the person in possession of said property within the District.

177 U. S., p. 9.

"The question to be determined on this appeal is whether the stock in question is personal property *"within the District"* in

which the suit is brought. If it is, then the case is embraced by the Act of 1875, and the Circuit Court erred in dismissing the bill."

Ib., p. 10.

It is respectfully submitted that in both of the above cases the situs of the shares was held to be at the domicile of the corporation for the *purpose of those suits* only, where the main relief sought was against the corporation itself to compel it to regard the complainants as the real owners of the property, etc., and that they are not authority for the position of respondent in the case at bar.

V.

THE POWER OF THE COURTS TO EXEMPT FROM *TAXATION BY JUDICIAL CONSTRUCTION.*

It is claimed that while the Court can not under the Constitution of 1877 directly "exempt" from taxation, any property, it can define what *is* property, and by defining "shares of stock" in a foreign corporation *not to be property,* under certain circumstances, thus indirectly exempt it.

The most that can be claimed for the decision relied on to support this doctrine, viz., 64 Ga., 799, is that in the State of the law as it existed when the tax assessment was made in that case in 1876, "shares of stock" here, in a foreign railroad corporation was not subject to be taxed against the holder here. Why did the Court so hold at that time? At that time such stock was not required to be returned by law, and was thereby not taxed under the Constitution of 1868. Under the Constitution of 1868 the Legislature could exempt any property from taxation, and could do this either *expressly,* or simply by not requiring it to be returned or placed upon the digest.

109 Ga., (h. n. 1.)

Now, under the Constitution of 1877 and the Acts of the Legislature of 1884-5 and 1898, such stock is required to be returned and can not be exempt.

109 Ga., 80 (h. n. 2.)

As stated, the only thing decided in 64 Ga., 799, was that as the law then stood shares of stock here in a foreign railroad

corporation was not subject to be taxed against the holder here. It is true that Justice Jackson in a sentence immediately following indulged in an abstraction which for some purposes is true, and for others is untrue, viz:

"Stock in a railroad is really but so many shares of its property and that property is real estate, for the most part at least, and taxable by the State in which the road is located."

But this deliverance is no part of the decision itself, which simply declared that stock in a foreign railroad held here was not at that time taxable here. He did not remotely intimate that if the Legislature had then seen proper to tax such shares as property here it would not have had the right to do so.

Clearly, under all the authorities the State had then, as it has now, the *power* to tax such shares as actual property in the hands of a resident holder. The decision went, therefore, no further, at most, than to hold that as the law existed in 1876, the State had not then seen fit to lay a tax upon shares of stock held here in a railroad without the State, whose property was taxed at its domicile.

It will be observed that prior to 1877 the *Legislature* in this State was vested with the power to deal with the subjects of taxation and to exempt such property as it saw fit; but by the Constitution of 1877 this power was taken away; that is to say, the *Constitution* itself undertook to declare what property should be taxed, and what might be exempt, and forbade the Legislature from exempting any property not specifically enumerated in and authorized to be exempted by the Constitution of 1877. All other property not thus authorized to be exempt was by the *Constitution itself* taxed.

Article 7 Sec. 2 Consti. of 1877;
Code of Georgia Sec. 5883-4;
Code of Georgia, Sec. 5886;
Verdery vs. Village, 82 Ga., 138, at 140; 84 Ga., 683; 109 Ga., 80 (h. n. 1, 2, 6 and 8, and at 98).

These mandates of the Constiution of 1877 have since been reinforced by definite declarations of the Legislature.

In 1885 an Act of the General Assembly of Georgia was passed entitled "An Act to provide for the correct returns of the

property in this State for the purpose of taxation, and for other purposes." In section 2 of said Act it was provided, as follows: "Personal property shall be construed, for purposes of taxation, to include all goods chattels, etc.,; all *stocks* and securities, whether in corporations within this State or other States owned by citizens of this State, *unless exempt* by the laws of the United States or of *this State.*"

Acts of 1884-5, page30.

By the Act of 1898, pages 34, 5 and 6, it was provided, as follows:

"In returning property for taxes all property shall be returned at its value. In addition to the questions now propounded to tax-payers by the Tax Receivers, questions shall be framed by the Comptroller General to reach *all* property upon which a tax is imposed by this Act, and especially the following questions:

* * * 30. How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State?

31. What was the gross nominal value thereof?

32. What was the fair market value thereof?

33. How many shares of stock did you own, on the day fixed for the return of property for taxation, issued by corporations within this State the capital stock of which is not returned by such corporation for taxation?"

Thus the present policy of the State in dealing with domestic shares and foreign shares for the purpose of taxation is here made clearly manifest. These legislative enactments clearly interpret the constitutional provision requiring all property to be taxed as not requiring shares of stock in domestic corporations whose corporate property is fully taxed by the State to be also taxed, because such domestic shares indirectly bear their just proportion of the public burden in the taxes collected from the corporate property, whereas the constitutional provision in question could not be so interpreted with respect to shares in foreign corporations whose corporate property is not taxed here.

If it be claimed that the Acts of 1884-5 made no such distinction between domestic and foreign shares, but required that

both should be returned unless specially exempt by the laws of the United States, or of the State of Georgia, it is enough to say in reply (1) that the Act of 1898 did make such distinction, and that it was competent for the Legislature by way of avoiding double taxation to so interpret the Constitution, there being nothing in the Constitutional provision itself making it mandatory upon the Legislature to substantially tax the same property twice in this State; and (2) where property has in effect *once* been taxed as in case of domestic shares, it *is* exempt from being taxed a second time by the same taxing power.

By the foregoing provisions of the Constitution of 1877, and of these acts of the Legislature passed since the decision of 64 Ga., 799, the policy of the State to tax shares of stock in a foreign corporation is clear and unmistakable and the Legislature can no longer, since the Constitution of 1877 "either expressly exempt from taxation or accomplish this result by a failure to tax any property except that which in the Constitution itself the General Assembly is expressly authorixed to exempt."

109 Ga., 80 h. n. 1 and 2);
109 Ga., 80 (h. n. 6).

Conceding therefore that it might be now competent, under the Constitution of 1877, for the Legislature and even for the Court by judicial interpretation to apply the doctrine insisted upon by the railroad companies with respect to domestic shares of stock, where the corporate property itself, which alone gives value to the shares, has been once taxed by the State and that therefore to tax the shares also would be in effect to tax the same property *twice*, there can be no such reason for applying the doctrine to shares of stock in a foreign corporation whose corporate property is not and can not be taxed at all by this State. The Constitution of 1877 requiring that all property shall be taxed, might not be violated by failing to tax domestic shares where the corporate property giving value to those shares has been fully taxed, while it could not be so satisfied in case of foreign shares held here whose corporate property is beyond the State. If these foreign shares themselves be not taxed, they pay nothing, directly or

indirectly to the support of the Government which pretects them.

But we deny that it is competent for any court of its own motion to declare that not to be property which is property, and thus in effect nullify a provision of the present Constitution taxing all property not expressely exempt thereby.

A parallel case to this is where even the Legislature was not permitted to define an "Armory" used by the State militia to be "public property" within the meaning of the Constitution and therefore exempt from taxation.

113 Ga., 883.

In that case the Supreme Court of Georgia says:

"Private property can not be converted into *public* property by the simple declaration of the General Assembly; and especially is this true when the purpose of the declaration is to relieve private property from a burden which the Constitution says in unmistakable terms shall be borne by it for the benefit of the public."

113 Ga., at 886.

A contrary doctrine would clothe the Courts with the power to give exemptions by holding certain species of property not to be property—a power not allowed even to the Legislature.

113 Ga., 885.

See 109 Ga., 80, at p. 98, where the Court submitted a quaere as to the power of the Legislature to provide against taxing shares even when the corporate property itself had been fully taxed by this State, and the object of so declaring might be to avoid double taxation by the same State of the same property; but even this quaere is not pertinent where the corporate property is in a foreign State, and only the shares are taxed here. In such a case there could be no such reason for not taxing the foreign shares since the corporate property is not and can not be taxed by this State.

In 113 Ga., at 885, the Court says:

"Any one claiming an exempion from taxation must show *an*

act of the General Assembly (not the decision of a Court rendered before the Constitution) passed in *pursuance of the Constitution,* authorizing the exemption." 113 Ga., at 885.

Such an Act may be claimed in behalf of *domestic* shares in the Act of 1898 (see question 33) but this very Act specifically requires the taxpayer to return for taxation the foreign shares.

It is idle to say that the railroad companies in this case are not claiming an *exemption*—not, it is true, an exemption conferred by the Constitution or by the Act of the Legislature, but nevertheless an exemption claimed under a judicial construction (antedating the existing Constitution and laws) that shares in a foreign corporation *are not property for* purposes of taxation, but mere *representations* thereof.

VI.

NO "EXEMPTION" NOT TO TAX SHARES WHERE CORPORATE PROPERTY TAXED.

It is contended by counsel for the Railroad Companies that "where Constitutions prohibit exemptions and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed are valid."

Why? Because being located in the State the property of the corporation is taxed once by the State, which satisfies the demands of the Constitution, whereas in case the property of the corporation is located outside the State, the property of the corporation is not and cannot be taxed; and the only thing left to be taxed are the shares. In the language of the Supreme Court of the United States in the Kidd vs. Alabama case (188 U. S., 730):

"If property (of the corporation) is untaxed by its laws, then for the purposes of its laws, the property is not taxed at all."

Kidd vs. Ala., 188 U. S., 730.

The cases cited by counsel for the Railroad Companies in support of the above proposition are:

Lewiston vs. Asotin, 64 Pac., 544 (Wash);
Carroll vs. Alsup, 64 S. W., 193 (Tenn).
Foster vs. Stevens, 13 L. R. A., 166-9 (Vt);
Bank vs. Nashua, 46 N. H., 389;
Sherman vs. Kimball, 54 N. H., 406.

The authorities cited sustain the principle only so far as it applies to domestic corporations except where there is a specific act of the legislature making it applicable to shares in a foreign corporation.

In so far as the above decisions relate to not requiring domestic shares to be taxed whose corporate property is fully taxed, they do not apply to the case at bar. They proceed upon the idea that these domestic shares have already been, in effect, once taxed by taxing the property which give the shares their sole value.

In Foster vs. Stevens (the Vermont case) the Revised Laws of that State, Section 270 specifically provides that shares in foreign corporation, where the corporate property is taxed, shall not be taxable in Vermont. It does not appear that the Vermont Constitution touches upon the subject of exemption or non-exemption from taxes.

See 13 L. R. A., 166.

Hyland vs. Central Iron, etc. Co., 13 L. A. R., 515 (Ind) also cited by counsel for the Railroad Companies, does not appear to be in point. There is a specific Act of Indiana providing that shares should not be taxed where corporate property is taxed. The decision simply says this does not apply to taxation of excess of value of capital stock over the tangible property.

13 L. R. A., 515.

It will be remembered that this very Court (Supreme Court

of Indiana) has distinctly held that the act above mentioned to the effect that shares should not be taxed where corporate property is taxed, did not apply to shares of stock in a foreign corporation, and that these should be taxed under the general law requiring all property to be taxed although domestic shares were specifically exempt in cases where the property of the corporation was taxed in Indiana.

Seward vs. Rising Sun, 13 Am. & Eng. R. Cas. 316, or 79 Ind. 353.

The case of Lewiston vs. Asotin (Wash), 64 Pac., 544, cited by counsel for the Railroad Companies, decided that after taxing all the property of a domestic corporation it would be double taxation to also tax the "capital stock" of the Company.

64. Pac. R., 544.

No hint is given that such would be the case as to shares in a foreign corporation whose property was not and could not be taxed by the State of Washington.

VII.

IT IS CLAIMED THAT THE ASKING OF A QUESTION IS NOT LEVYING A TAX.

Counsel for the Railroads contend that the question of the Act of 1898 calling for a return of foreign shares for taxation can be given effect and should be construed merely as calling for the information as to foreign shares that the Tax Receiver may ascertain whether there be any which come within the class of those corporations which do not pay taxes on the property representing the value of such shares and as intended to elicit as to foreign shares, the information sought by section 33 as to domestic shares.

See response to the Writ, pp. 6, 7.

In addition to what has been said on this branch of the case, in the main brief on pages 23, 24 and 25, we submit this reply to the above:

This is subtle and ingenious but it is without force since this inquiry could elicit no such information, as such question does not call for the name of the stock or its location, or whether the corporate property is taxed in the State where located.

VIII.

"UNIFORMITY" AND "EQUAL PROTECTION."

It is contended by counsel for the Railroad Companies that to tax foreign shares and not to tax domestic shares violates the "uniformity" clause of the Georgia Constitution and the "equal protection" clause of the United States Constitution.

Kidd vs. Alabama, 188 U. S., 730, answers the latter contention in totidem verbis.

Does it not also in effect answer the first?

Again applying the principle so often herein repeated, where the State of Georgia has custody of the corporate property and taxes it once it may well allow that in that case the State Constitution has been satisfied without taxing its shares also; whereas if the corporate property by reason of being outside of the State escapes all domestic taxation, the State may consider it no lack of uniformity and no inequality to exact at least of the foreign shares, located here as personal property in the hands of a resident owner, their right ful contribution to the support of the Government which protects them and their owner.

Kidd vs. Ala., 188 U. S., 730

See our Main Brief, pages 13, 14 and 15.

The uniformity required by the Constitution of 1877 is that the tax "shall be uniform upon the same class of subjects," (5883 of the Code). Here there would be absolute uniformity. The domestic shares would pay its tax indirectly by the corporation paying taxes on the corporate property. The foreign shares would pay the same amount of taxes but pay them directly upon the shares which alone are located in this State.

Hence the uniformity clause would seem to *require*, rather than *excuse*, their taxation.

IX

As before stated counsel for the Railroad Companies have cited authority to the point that "where Constitutions prohibit exemptions and require the uniform taxation of all property, provisions providing that shares of stock shall not be taxed where the property of the corporation is taxed, are valid."

It is submitted that these decisions are also to the point that there is no violation of the uniformity clause of the Georgia Constitution in this tax Act not requiring a tax upon domestic shares of stock, and at the same time requiring a tax upon foreign shares held here, whose corporate property is not here taxed, and, therefore, not taxed at all so far as the State of Georgia is concerned.

In other words, while a State under such provisions of the Constitution might have the *power* to tax both the corporate property and the shares of its domestic corporations, there is nothing in these provisions of the Constitution requiring the State to do so, where it would operate, in effect, to double tax the same property by the same taxing power.

X.

But if it be true that the legislature under the Constitution of 1877 is without power to relieve or except domestic shares from this tax but must require them as well as foreign shares to be returned, the effect would be not to invalidate the tax on foreign shares, but only to render ineffective the attempt to except domestic shares. The effect would be to make the domestic shares subject and not to make void the tax upon foreign shares.

109 Ga., at 92 and 93.

The Supreme Court of Georgia, in above case, says:

"The Act of 1896 (identical with Tax Act of 1898 on the point ruled) does provide for the assessment and levy of a uni-

form ad valorem tax on all the taxable property in the State This does furnish authority sufficient to cover all taxable property, etc. * * * If, then, there is an act broad enough to cover all property and there is an attempt to except *some* from it, the Act will stand, but the exception will fall."

Atlanta National Association vs. Stewart, 109 Ga., at 92 and 93.

In no case will any Court declare an act of the Legislature void because in conflict with the Constitution, unless obliged to do so.

Least of all will a Federal Court undertake to declare an act of the State Legislature to raise State revenue, void, on account of its being violative of some provision of the State Constitution. It is the peculiar business of the State Courts to do this.

Calder vs. Bull, 3 Dallas, at pages 392-393.

If this Court should reach the conclusion that there is a lack of uniformity or equality in taxing foreign shares while exempting domestic shares, it would follow the decision of the Supreme Court of Georgia, above cited, (109 Ga., 92, s.) and hold that where the act is "broad enough to cover all property and there is an attempt to except *some* from it, the act will stand, but the exception will fall."

Atlanta National Association vs. Stewart, 109 Ga., 92 and 93.